(23)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 1092

CITY OF OAKLAND, a Municipal Corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY BRIEF

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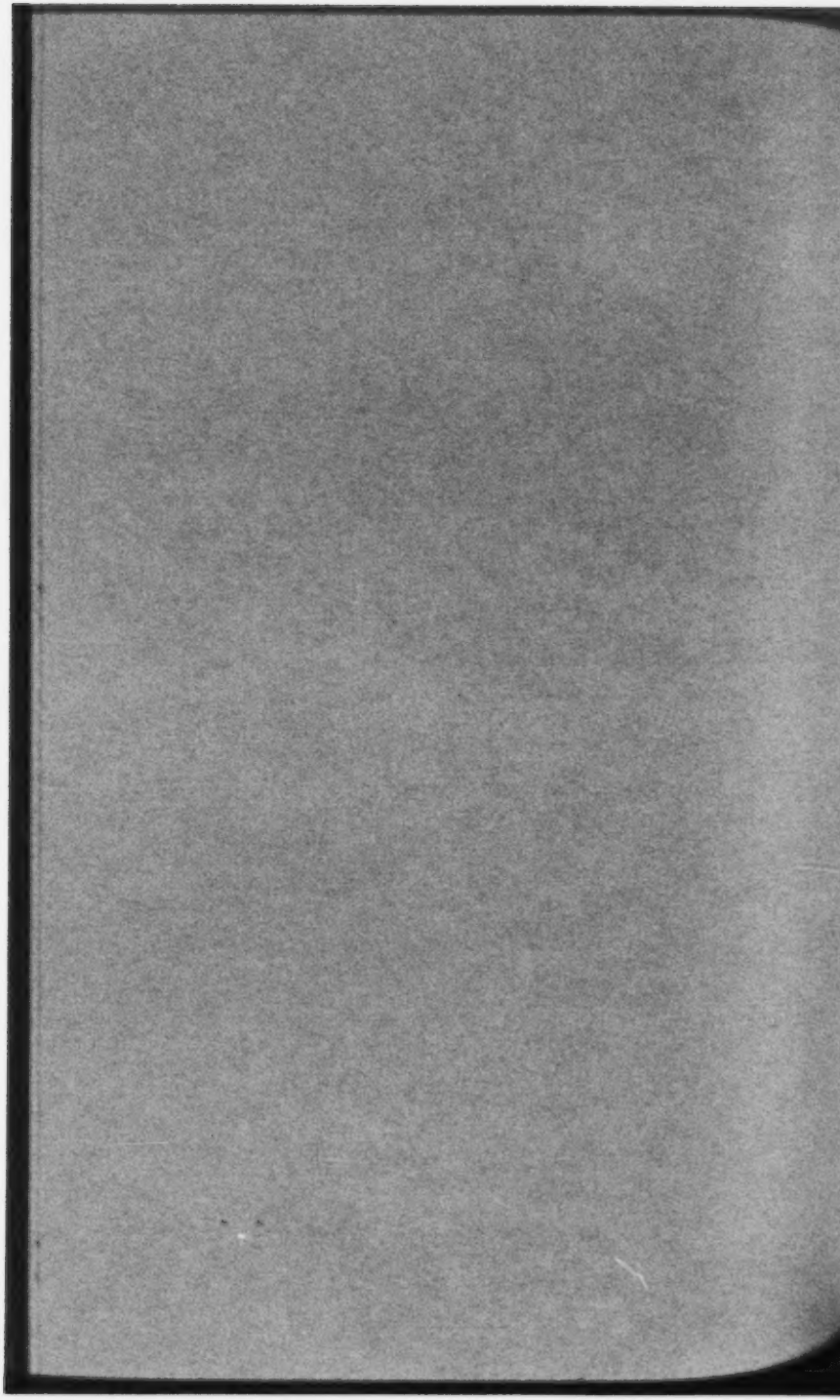

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INTRODUCTORY STATEMENT.

This brief is respectfully presented in reply to the Brief for the United States in opposition to the granting of the Petition for a Writ of Certiorari.

The Opposing Brief, appears to us to deal principally with the merits of the points as to which the petitioner seeks a decision by this Court, and only incidentally with the reasons, advanced in the Petition and Supporting Brief, for a hearing and decision by this Court. This

reply will be addressed to those reasons, and to respondent's treatment thereof.

We shall use herein the same headings used in our Supporting Brief (pages 9-11).

POINT A.

THE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The respondent does not dispute, and obviously cannot dispute, the proposition that, according to the accepted and usual course of judicial proceedings, a defendant is given an opportunity to be heard before judgment is rendered against him. Nor does the respondent deny that the Circuit Court of Appeals sanctioned a complete departure from such accepted and usual course. The respondent expressly admits the departure.

But it argues that the departure is wholly lacking in significance, and that consequently it would not justify the exercise of this Court's supervisory power, because "Petitioner's rights were not affected by entry of the judgment" (page 12), and because the judgment did not "cut off adversary judicial inquiry into the validity of the taking" (page 12), and because the petitioner "will have full opportunity to urge any defenses" (page 12).

It may be noted that respondent's assurances, in reference to the lack of effect of the judgment—its assurances that the judgment is wholly lacking in effect—are not supported in the opposing brief, either by any

court decision, or by any text writer, or otherwise, and that they are directly opposed to the universally accepted doctrine of *res judicata*. It may be noted further that the hearing visualized by the respondent is not provided for by any Act of Congress, and is wholly unknown to the law. It is also significant that the District Court did not endorse these assurances, or any of them, since it conceded to the petitioner merely the right to attack its judgment on the ground of fraud (Tr. 35), and that the Circuit Court of Appeals failed to direct the District Court to give effect to any of these assurances (Tr. 65, 66).

The petitioner does not regard these novel and unsupported assurances by opposing counsel as a sufficient guarantee that it will not be prejudiced by the District Court's *ex parte* judgment.

And, even if these assurances could be taken at their face value, there would still be presented herein a complete and unprecedented departure from the accepted course of judicial proceedings—a departure so basic as to call for a hearing in this Court, and for an exercise of this Court's power of supervision.

POINT B.

THE CIRCUIT COURT OF APPEALS DECISION IN CONFLICT WITH AN APPLICABLE DECISION OF THIS COURT.

In our Supporting Brief (pages 10-11), we pointed out that the decision sought herein to be reviewed is in

direct conflict with the decision by this Court in *Windsor* v. *McVeigh* 93 U. S. 274.

The opposing brief contains no reply to this second reason for the granting of the petition, except the unsupported assertions (pages 11, 13), similar to those discussed under Point A, supra, that the judgment of the Circuit Court of Appeals did not foreclose "petitioner in respect of some issue that it is entitled to raise in the proceeding", and "did not foreclose subsequent defense by petitioner to the suit on any ground".

We respectfully submit that these assertions by counsel are not of sufficient substance to meet the issue that the decision of the Circuit Court of Appeals, that the District Court's judgment is valid, is in direct conflict with this Court's decision that the District Court's judgment against McVeigh, similarly rendered without an opportunity to be heard, was "absolutely void" (page 282), "a blot on our jurisprudence and civilization" (page 277), and "a solemn fraud" (page 281).

Apparently opposing counsel do not deny that the judgment, affirmed by the Circuit Court of Appeals, would be the same kind of a judgment as the one thus characterized so accurately and pointedly in *Windsor* v. *McVeigh*, supra, *if this judgment has any effect.* But, if it has no effect, why should it have been rendered in the first place? And why should it not have been vacated? And why should it have been affirmed? And why do counsel now ask this Court to sanction its rendition?

We respectfully submit that the conflict with this

Court's decision in *Windsor* v. *McVeigh* is direct and is real, and that, for this second reason, the petition should be granted.

POINT C.

IF IT IS SUI GENERIS, THE QUESTION AS TO THE RIGHT OF THE PROPERTY OWNER, TO BE HEARD IN AN EMINENT DOMAIN PROCEEDING, IS AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

We find in the opposing brief no direct reply to this, the third, reason presented in the supporting brief (pages 11-15) for the granting of certiorari herein.

Apparently counsel regard the question as being *sui generis*—as being one that is not answered by this Court's decision in *Windsor* v. *McVeigh*, supra. And apparently they concede that, if it is *sui generis*, it is not a question that has been settled by this Court.

It appears to us that the question presented, if *sui generis*, is of sufficient importance to justify its consideration by this Court, and that, for this third reason, the petition for a writ of certiorari should be granted.

Dated, Oakland, California, April 28, 1942.

Respectfully submitted,

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